79-5184

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

RECEIVED
AUG 1979
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SUPREME COURT, U.S.

LEONEL LAUREL, PETITIONER

V.

THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, RESPONDENT

IN THE MATTER OF THE EXTRAORDINARY WRIT OF MANDAMUS
TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

MOTION FOR THE GRANTING OF THE EXTRAORDINARY WRIT OF MANDAMUS

TO THE MOST HONORABLE CHIEF JUSTICE AND JUSTICES OF THE COURT:

Be it remembered that on this the 1st day of August, 1979, Petitioner, Leonel Laurel, appearing pro se, petitions this Court to issue a mandamus to the United States Court of Appeals, Fifth Circuit, requiring them to permit this Petitioner to go forward with his appeal in that Court in forma pauperis from an adverse ruling in the United States District Court, Western District of Texas, San Antonio Division. The reasons for such an extraordinary request is as follows:

I.

On or about April 21, 1976, Petitioner was sentenced to 15 years incarceration and a special parole term of 15 years to follow after having pleda guilty to a conspiracy cout under 21 USC 846. (See attachment A-1).

II.

On or about February,23, 1979, petitioner filed a motion in the District Court asking that his sentence be corrected under Rule 35, F.R.Cr.P. (See Attachments B-1, B-2, B-3, and B-4).

III.

On or about the 18th day of April, 1979, the United States District Court, Western District of Texas, San Antonio Division entered an order denying relief to Petitioner. This Order is a most remarkable document. It begins by stating that Petitioner's motion is a motion for a reduction of sentence, which it was not and could not be construed as such if it had been read. Then the Judge found that he had no jurisdiction because of the 120 day rule that applies to those motions that request a reduction of sentence. Then the Judge proceeded on to state that if he had jurisdiction he would not reduce the sentence. The order was stamped with a rubber stamp with the Judges signature afixed. This leads the petitioner to believe that the Judge never saw the motion of petitioner nor the order entered. Any other reasoned belief would be less charitable. (See Attachment C-1 and C-2).

IV.

On or about April, 24, 1979, Petitioner filed a Notice of Appeal (Attachment D-1), and a "Motion to Proceed in Forma Pauperis" (Attachement D-2), and an Affidavit to support same. (See Attachement D-3 and D-4). In the cited Motion and affidavit it was pointed out that the order overruling Petitioner's motion was totally unresponsive.

V.

On or about the 9th day of May, 1979, The United States District Court entered an order denying Petitioner's request to proceed with his appeal in forma pauperis. Again the Order was rubber stamped with the Judge's signature. The reasons given were that "....an appeal would be frivolous and interposed merely for delay." (See Attachment E-1). This Petitioner contends that if given the opportunity he can show that this is a standard form or stock answer

given by this court as a normal course in most of his cases. One days research in the District Clerk's office in San Antonio, Texas, should show this. Anyone that even glances at Petitioner's "Judgment and Commitment order"(attachement A-1) would know that it is impossible to arrive at a conclusion that Petitioner's "Motion to Correct the Sentence" (Attachement B-1) could be "interposed merely for delay." This reason is so far out and unreal that the only explanation is that some secretary entered this order with the use of the Judge's rubber stamp signature on a memograph form. Petitioner's appeal is not frivolous. Anyone that will take the time to read the motion and brief and check the cases thereunder would know that it is not frivolous. The only thing frivolous is the justice that is being dispensed in this case. Attached hereto is a copy of the brief that will be filed in this case when and if it can be heard on appeal in the Court of Appeals, Fifth Circuit.

VI.

On or about May 18, 1979, Petitioner filed a motion to proceed in forma pauperis on appeal in the Court of Appeals, Fifth Circuit. (Attachment F-1, F-2, and F-3). On or about June 23, 1979, Petitioner wrote the Fifth Circuit a letter (Attachment G-1 and G2) requesting the Judges to rule on the motion so that Petitioner could file his brief. On July 6, 1979, an order was entered denying Petitioner's right to proceed in forma pauperis on appeal. No reason was given.

VII.

Petitioner is confident that there is some justice somewhere in the system, that if petitioner just keeps looking for it he will find it and have his day in Court on his motion. Somewhere there is a Judge that will read the motion and if it is ever read then it will at least get a fair hearing. Petitioner understands that we are talking about only fifty dollars as a start. But to a person that has

been incarcerated since early 1976 and just now has reached the pay scale of twenty-five dollars per month it seems like a great, great deal. It may be insignificant to a Judge making over 50,000 dollars a year but this petitioner is making $300.00 a year. The additional costs on the appeal to the Fifth Circuit would not be much more. The record that is needed is not more than twenty or thirty pages. The brief is drawn. It is just not understandable that this petitioner could be refused the right to proceed with his appeal.

VIII.

In addition to the proposed brief attached hereto to be filed in the Court of Appeals, Fifth Circuit, it should be noted how the Judges rush to read the plain meaning of a statute when it is detrimental to a defendant. U.S. v. Rodriguez, 585 F2d 1234, "In a conspiracy under 21 USC § 846 or 21 USC 963, there is no need to allege or prove overt acts. U.S. v. White, 569 F2d 263,266; U.S. v Thomas, 567 F2d 638, 641; U.S. v. Palacios, 566 F2d 1359, 1364 n. 9. " But when the plain meaning of the same statute is asked to be read in favor of the defendant, the Courts seem to draw back and not face the issue. This case.

Wherefore, premises considered, and relying on Rules 31 and 53 of this Court, Petitioner prays that a mandamus issue to the United States Court of Appeals, Fifth Circuit, directing them to permit this petitioner to proceed in his appeal in forma pauperis, that further this petitioner has ask that proceedings be stayed in the Court of Appeals Fifth Circuit. If this stay is denied then it is requested that a stay issue from this Court without repleading same.

Respectfully Submitted,
Leonel Laurel
Leonel Laurel, Pro Se
Box 1000 89216 132
Leavenworth, KS 66048

CERTIFICATE OF SERVICE

I, Leonel Laurel, Hereby certify that I have sent a true copy of the motion and affidavit above to the U.S. Attorney, Western District of Texas, and the Clerk of the Court of Appeals, Fifth Circuit, and the Solicitor General of the United States, by depositing a copy of same in the United States Mail this the 4th day of August, 1979, addressed to the above.

Leonel Laurel
Leonel Laurel.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 7908293

LEONEL LAUREL, Petitioner,

versus

UNITED STATES OF AMERICA, Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLANT LEONEILAUREL

Leonel Laurel
Apellant, Pro Se
Box 1000 89216 132
Leavenworth, KS 66048

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CERTIFICATE CONCERNING ORAL ARGUMENT

There is no necessity for an oral presentation to the Court.

Leonel Laurel, pro se

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Title 21 U.S.C. § 846 and § 963 do not include as part of their punishment provisions a Special Parole Term.

STATEMENT OF THE CASE

On or about the 21st of April, 1976, Defendant-Appellant Laurel was sentenced to fifteen years of imprisonment and in addition thereto to a Special Parole Term of fifteen years, having prior thereto pled guilty to Count one in the indictment setting out the offense of conspiracy to possess a controlled substance with intent to distribute in violation of 21 USC 846. In February of 1979, Defendant-Appellant Laurel filed a motion requesting a correction of sentence deleting the Special Parole Term. On the 18th of April, 1979, the District Court entered an Order denying the motion. From which Defendant-Appellant Laurel filed a timely Notice of Appeal. When this brief is filed it will be known that he has perfected his appeal.

SUMMARY OF ARGUMENT

On its face, § 846 does not provide for the imposition of a special parole term. Since § 846 is a criminal statute, it must be strictly construed. It is impermissible to read into that statute a penalty for which it makes no provision and to which it does not refer, particularly since the legislative history reveals that Congress did not mean to authorize imposition of that penalty.

ARGUMENT

Title 21 USC § 846 and § 963 are identical in language, as follows:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

From the very inception and first application of these statutes, they have been read to include a Special Parole Term if the "object or the attempt or conspiracy" also carried a Special Parole Term in the substantive statute. It would seem that the first correct reading of the statute was made by a defense or appellate lawyer in 1975. (United States v. Bankert, 507 F2d 190, 5th, 1975). Any reliance by the Government on earlier cases would be misplaced since the argument made here was not presented to the appellate courts. (U.S. v. Wiley, 519 F2d 1348, 2d Cir. 1975, Cert. Denied; U.S. v. Armedo-Sarmiento, 543 F2d 715, 2d Cir. 1976, Cert. Denied; U.S. v. Rich, 518 F2d 980, 8th Cir. 1975, Cert. Denied)

In February of 1978, Judge Irvin Hill of the Central District of California, sua sponte, entered an order denying a motion based upon the lack of a Special Parole Term following a sentence for the conviction under 21 USC 846 for the vacation of sentence and conviction. (Fassette v. US, 444 F.Supp. 1245, CDC, 1978). In denying Fassette's 28 USC 2255 motion Judge Hill wrote:

> ". . .conspiracy is not punished by 21 USC 841. Such conspiracy is made a separate offense by 21 USC 846 and the punishment for such a conspiracy is separately prescribed by 21 USC 846."
>
> ". . .21 USC 846 is quite different in its language."
>
> "The clear meaning of § 846 is, as I read it, that the punishment for violation of that section shall consist only of "imprisonment or fine or both." A special parole term of the type prescribed by 21 USC 841 is punishment in addition to imprisonment and fine. Section 841 specifically refers to such a special parole term as something 'in addition to' imprisonment."
>
> "A statute providing punishment for a criminal offense should be strictly construed." ". . .I find no language in § 846 which would permit any kind or type of punishment or detriment which is additional to fine and imprisonment. I find no language in that section which would authorize imposing a special parole term thereunder." "The words of § 846 "which may not exceed the maximum punishment prescribed for the (substantive) offense" modify the words "punishable by imprisonment or fine or both."
>
> ". . .Congress has used language in § 846 which separately defines the permissible punishment for violations of that section and uses different language in defining it." (see not 1,1247 Id.)
>
> ". . .it is not possible to distinguish the Dankert case. But Dankert is a very short per curiam opinion which is not persuasively reasoned."
>
> "2. Petitioner cites U.S. V. Barnard, 553 F2d 389, (5th Cir. 1977); U.S. v. Scholle, 553 F2d 1109 (8th Cir. 1977)....They are of no precedential value." ". . .irrelevant is Petitioner's contention that in this District and elsewhere, other judges are commonly imposing a special parole term as part of a sentence under § 846.

In June of 1978, the 10th Circuit in U.S. v. Jacobson, 578 F2d 863, in the face of the reasoning in Fassette retrogressed back to Dankert, and even cited Wiley, Arredo-Sarmiento, and Rich, prefacing the citations with "The authorities hold contrary to the position of appellant" and following the citations with "The argument made here was not presented." The only additional reason given for their holding was that,"

> "From the wording in § 841(b)-(c), it would appear that Congress viewed the special parole term as being a part of the term of imprisonment to which it was appended"
>
> POSTULATE I.
> "Paragraphs (1) to (3) of § 841(b) all make a special parole term mandatory whenever imprisonment is also imposed."
>
> POSTULATE II.
> "Thus, a parole term may never be imposed without imprisonment; it must always accompany imprisonment."
>
> POSTULATE III.
> "Section 841(c) provides, in addition, that violation of the special parole may result in an increase in the original term of imprisonment to the extent of the length of the special parole term."
>
> CONCLUSION :
> "It is impossible, therefore, to accept the argument that the parole term is to be imposed only where the charge is violation of the substantive provision."
>
> FURTHER CONCLUSION:
> "It is logical to view the reference to imprisonment in § 846 as intending to incorporate all of the imprisonment provision in § 841(b).

The postulates do not lead to a logical conclusion that § 846 was intended to incorporate the Special Parole Term as set out in § 841, prefacing a conclusion by the word logical does not make the conclusion logical.

> "But the Special Parole Term is a new concept. By statute it "shall be in addition to, and not in lieu of, any other parole provided for by law.". 21 USC Sec 841(c). It is designed to take effect upon the expiration of the period of parole supervision following mandatory release, or at the full term date following parole, or upon release from confinement following sentence expiration." Roberts v. U.S., 491 F2d 1236.

Judge Stapleton in U.S. v. Mearns, Crim. Action No. 77-90, D.Del., opinion filed December 8, 1978, seconded by Judge Lord, Crim. Action No. 78-322, U.S. v. Jacquinto, and U.S. v. Trainor, D.C.,EDP, opinion entered February 2, 1979, points out that the 10th Circuit panel:

> "ignore(d) an important part of the language of Section 841(b)(1)(A). That section provides that where a special parole term is mandated by a sentence of imprisonment, it is to be imposed 'in addition to such term of imprisonment.' Thus, as used in Section 841, special parole is not merely part of imprisonment, but is considered to be something additional to the imprisonment."

Apart/given the fact that 'parole' and 'imprisonment' are mutually exclusive, (Jacquinto-Trainor, Id.), the 10th Circuit's position becomes wholy untenable when Title 18 USC 371 is reviewed as to punishment in respect to the underlying substantive statute's punishment provisions. (Fassette, supra).

The 4th Circuit, in U.S. v. Burman, 584 F2d 1354, attacked the plain language of § 846 in another manner:

> "In that case, the Fourth Circuit held that the imposition of a special parole term is required when imprisonment is imposed under § 846, reasoning in essence that the 'statutory scheme' requires that the penalties for conspiracy be identical to those for the substantive offense." Jacquinto-Trainor, supra.

But Judge Lord points out:

> "But the 'statutory scheme' indicates otherwise; in enacting 21 USC § 841, 845, and 846, it is clear that Congress has used the terms 'fine', 'imprisonment', and 'special parole' to describe three distinct penalties, and that § 846 provides for the imposition of only two to them." Id.

"It is impermissible to read into that statute a penalty for which it makes no provision and to which it does not refer,. . ." Id.

Once upon a time, there were axiom in the Criminal Law that defendants could rely on. A criminal statute must be strictly construed. Courts would not go behind the plain language of a criminal statute. A criminal statute would be construed in the most favorable light for the defendant. These and more. But today under our present system of Federal Justice these axioms cannot be relied on. Therefore this brief will go behind the plain language of § 846 and try show the intent of Congress when the section was enacted.

> ". . .the House Report which accompanied the 1970 Act states that § 846. . ."
> "provides that any person who. . .conspires to commit any offense defined in this title may be punished by imprisonment and/or fine which may not exceed the maximum amount set for the offense, the commission of which was the object of the . . .conspiracy." House Report No. 1444, 91st Cong. 2d Sess., 3 U.S. Code Cong. and Admin. News 4617 (1970) ((emphasis added)) Jacquinto-Trainor, supra.
>
> "It is also noteworth that House Report 91-1444, supra, does not mention special parole as a punishment for conspiracy, but does discuss it as a penalty for the substantive offense, Section 841 (section 401 of the 1970 Act), and for the distribution to persons under age 21, § 845 (section 405 of the Act). See 3 U.S. Code Cong. and Admin, News 4614-4617 (1970). If in fact Congress had meant to include special parole as a penalty under § 846, it is odd that the authors of the House Report would have taken such care to describe all the penalties available under § 841 and § 845, but would have omitted one from their discussion of § 846. The only reasonable conclusion which can be drawn from the legislative history and from the express references to special parole in § 841 and § 845 and the absence of any reference to special parole in § 846 is that Congress did not intend to authorize the imposition of special parole under § 846." NOTE 4. Jacquinto-Trainor, supra.

For all of the above reasons the District Court erred in overruling Appellant's Motion to correct his sentence and judgement to remove the Special Parole Term therefrom.

CONCLUSION

The plain language of the statute 21 USC § 846 and § 963, and the rules of law that a criminal statute must be strictly construed, and the rule of law that a criminal statute should be construed most favorably in favor of the defendant require a finding for the appellant.

PRAYER

That this Court correct the defandant-appellant's sentence to remove the surplusage of the Special Parole Term therefrom, or in the alternative that this case be remanded to the District Court with directions to perform the same.

Respectfully submitted:

Leonel Laurel
Leonel Laurel, Pro Se
Box 1000 89216 132
Leavenworth, KS 66048

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Brief for Appellant has been served on the U.S. Attorney, Western District of Texas, by mailing same by U.S. mail to U.S. Federal Courthouse, 655 Durango Blvd., San Antonio, Texas 78206, this 4th Day of August, 1979.

Leonel Laurel
Leonel Laurel.

United States District Court

DEFENDANT: LEONEL LAUREL — 89216-132

THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DOCKET NO. SA 76 CR 8

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH DAY YEAR: April 21, 1976

[ ] WITHOUT COUNSEL — However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL — Frank D. Masters (Name of counsel)

PLEA

[X] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE. [ ] NOT GUILTY

re-arraignment date, 2/25/76.

FINDING & JUDGMENT

There being a finding of [ ] NOT GUILTY. Defendant is discharged
[X] GUILTY. to Count One.

Defendant has been convicted as charged of the offense(s) of knowingly, willfully & unlawfully, combining and conspiring, confederating & agreeing together with another, & with diverse other persons to the Grand Jury unknown, to commit and offense against the U.S., to-wit: to knowingly, unlawfully & intentionally possess with intent to distribute approx. 20 ounces of heroin, a Schedule I Narcotic Drug Controlled Substance in vio. of Title 21, USC, Sec. 841(a)(1), and Title 21, USC, Sec. 846, on or before November 14, 1975 and continuing until November 15, 1975, in the Western District of Texas.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Fifteen (15) years, with a Special Parole Term of Fifteen (15) years.

Director, FEDERAL PENITENTIARY
Leavenworth, Kansas

MAY 20 1976

RECEIVED

SPECIAL CONDITIONS OF PROBATION

The Defendant is to be given credit for the time spent in the Bexar County Jail.

Upon motion of the Assistant U. S. Attorney, Count Two of the Indictment was dismissed by the Court.

FILED
MAY 3 1976
DAN W. BENEDICT, CLERK
BY Deputy

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the standard conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

STATE'S MOTION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk delivers a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

RETURN

I have executed this judgment as follows:

Defendant delivered on this date 5-3-76 to Lona R. Zentmeier at Leavenworth, Kansas

DATE MAY 1 1976

A-1

VI.

Title 21 USC 846 does not include within its provision a Special Parole Term and therefore the portion of the sentence stateing that defendant should serve a fifteen year special parole term is an illegal sentence and surplusage.

Wherefore, premissesxy considered, Defendant prays that his Court correct his sentence, judgment and commitment to read that he was sentenced to fifteen years imprisonment and that the surplusage in the sentence be removed.

Respectfully Submitted,

Leonel Laurel, Pro Se
Box 1000
Leavenworth, KS 66048

Certificate of Service

I, Leonel Laurel, certify that I have delivered to the U.S. Attorney and Frank D. Masters a copy of the foregoing motion by placing the same in the U.S. Mail addressed as follows:

U.S. Attorney
Federal Courthouse
655 E Durango Blvd
San Antonio, TX 78206

Frank D. Masters, P.C.
E-111 Petroleum Center
San Antonio, TX 78209

on February 23, 1979.

Leonel Laurel

All of the matters alleged in the Motion are part of the record in this cause.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA		
VERSUS		NO. SA 76 CR 8
LEONEL LAUREL		

MEMORANDUM OF LAW FOR THE MOTION TO CORRECT SENTENCE

JURISDICTION:

Rule 35 F.R.Cr.P. states in part "The Court may correct an illegal sentence at any time....." Whether Rule 35 covers the broader field of collateral attack where a hearing to consider matters dehors the record is necessary, we need not here determine. The Rule certainly covers a case like the present one where the claim is that the sentence imposed was illegal on its face. Heflin v United States, 79 S.Ct. 451, 358 U.S. 415, 3 L.Ed.2d 407.

SEVERABILITY OF SENTENCE:

A sentence entered for a term in excess of that authorized by the statute under which guilt was found is not void in its entirety, but is void only as to the excess. U.S. v Lynch, 159 F2d 198, Duggins v U.S., 240 F2d 479. A sentence is legal so far as it is within provisions of law and jurisdiction of the court, and is void only as to excess when such excess is separable and may be dealt with without disturbing valid portion of the sentence. U.S. v Neufield, 62 F.Supp. 600. Where a two-legged sentence imposing fine and imprisonment is illegal the court may correct sentence by vacating either leg thereof. U.S. v Local 804, International Brothers of Teamsters, Chauffeurs, Warehousement and Helpers of America, 328 F.Supp. 1359.

ILLEGAL SENTENCE:

The defendant only claims that portion of the sentence as to Special Parole Term is illegal and is severable from the valid protion of the sentence, Cases id. Sentences subject to corredtion under this rule allowing correction of an illegal sentence at any time are those that the judgement of conviction did not authorize. U.S. v Morgan, 74 S.Ct. 247, 246 U.S. 502, 98 LEd. 248. When a sentence has been imposed for which there is no authority in law, trial court has power and duty to expunge void sentence and pronounce legal sentence, whenever the defect is discovered. McNutt v Schneckloth, 241 F2d 128. This rule applies only to illegal or unauthorized sentences. Fitzgerald v Beasley, 52 F.R.D. 286

UNAUTHORIZED BY LAW:

Defendant pled only to Count 1 of the indictment which set out a violation of Title 21 USC 846 which reads:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. (emphasis added)

There is no way to read this statute to punish a defendant other than "imprisonment or fine or both." The plain language of the statute sets out "imprisonment or fine or both" as the only punishment. The phrase "which may not exeed the maximum punishment...." can only modify "imprisonment or fine or both". Fassette v U.S., USDC CCalif; 2/3/78. 22CrL 2532-33, 3/22/78. It should be noted further that "exeed the maximum punishment" could not apply to Special Parole Terms since no maximus are given for them in the statutes.

Respectfully Submitted,

~~xxxxxx~~ Leonel Laurel.

B-4

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVSION

FILED

APR 19 1979

CHARLES W. VAGNER, Clerk

By _____ Deputy

UNITED STATES OF AMERICA §

§

§

§

§

§ CAUSE NO. SA-76-CR-8

§

§

LEONEL LAUREL §

O R D E R

ON this 18th day of April, 1979 came on to be considered the Motion of the defendant for a reduction of sentence pursuant to Rule 35, Federal Rules of Criminal Procedure.

> " Rule 35 provides that such a motion must be filed within 120 days after sentencing in a case in which no direct appeal was taken. Since no direct appeal was taken from the judgment and sentence in this case, the court below lacked jurisdiction to grant the relief requested, and this Court has no jurisdiction over the appeal. Rule 46(b), F.R.Crim.P.;United States v. Gorman, 5 Cir. 1970, 431 F.2d 632; United States v. Ellenbogen, 2nd. 1968, 390 F.2nd 537, cert denied 1968, 393 U.S.918, 89S.Ct.241, 21 L.Ed. 2nd 206." United States v. Granville, 5 Cir. 1972, 456 F.2d 1073.

In the case where an appeal is taken Rule 35 provides that the Court may reduce a sentence "... within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment of dismissal of the appeal, or within 120 days after entry of any order of judgment of the Supreme Court denying review of , or having the effect of upholding, a judgment of conviction..." The rationale of Granville, supra., applies equally to each part of Rule 35.

The Court finds that the 120 day period has expired and that there fore no jurisdiction exists under Rule 35 to reduce the sentence.

C-1

The Court further finds that, even if jurisdiction did exist whereby said sentence might be reduced at this date, said request for reduction would be denied for the reason that full consideration was given to the sentence of the defendant at the time of sentencing and no fact of condition now exists which was which was not made known to the Court previously or which would warrant reduction of sentence at the present time and accordingly, said request is hereby, in all things, DENIED.

ORDERED AND ENTERED this 18th day of April, 1979.

JOHN H. WOOD JR.
UNITED STATES DISTRICT JUDGE

C-2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA *
*
VS. * CAUSE NO. SA-76-CR-8
*
LEONEL LAUREL *

Notice of Appeal

Notice is hereby given that Leonel Laurel, defendant above named, hereby appeals to the United States Court of Appeals for the 9th Circuit from the order dated: 18th of April, 1979, Filed April 19, 1979, and delivered via the United States Post April 24, 1979, to the said defendant Laurel. Said Order denied relief to defendant Laurel under a motion filed by defendant under Rule 35 F.R.Cr.P. requesting that an illegal sentence be corrected.

LEONEL LAUREL
89216-132
Box 1000
Leavenworth, KS 66048

I certify that a copy of this notice has been sent to the USA by placing a copy thereof in the U.S. Mail. This 24, day of April, 1979.

Leonel Laurel

D-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA *
*
VS. * CAUSE NO. SA-76-CR-8
*
LEONEL LAUREL *

MOTION TO PROCEED IN FORMA PAUPERIS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Leonel Laurel, defendant in the above numbered and styled cause and moves the Court to permit him to proceed in forma pauperis and attaches his affidavit hereto to support the fact that he is indegent to such a degree that he should be permitted to proceed with this appeal in forma pauperis; and,

1) that this appeal is not a frivilious appeal in that a U.S. District Judge for Central California in a very well reasoned opinion finds that 21 USC 846 does not include a Special Parole Term in its possible punishments. See Fassette v U.S., 444 F. Supp. 1245, CDO, 1978. And on December 8, 1978, Judge Stapleton in U.S. v Mearns, followed by Chief Judge Lord in U.S. v. Jacquinto & Treiner, followed the lead of Judge Hill in Fassette. The two later cases as yet not published.

2) that the Learned Judge in this Court denied defendant's motion properly (see U.S. v. Dankert, 507 F2d 190, 5th Cir. 1975) but for the wrong reasons. This was never a motion for a reduction in sentence and is not restricted by the jurisdictional question of the 120 days in Rule 35. A motion to correct an illegal sentence can be filed at anytime. Rule 35 F.R.Cr.P. The reasoning set out in the Order overruling this motion to correct an illegal sentence is

not responsive to the motion nor does it seem reasonable that the Judge even read the motion; and,

2) The reasoning in Dankert supra is totally inaccurate and the Circuit Court should have an opportunity to correct its prior error in logic.

Wherefore, premises considered, Defendant request that the Court enter an order permitting him to proceed with this appeal in foram pauperis.

Respectfully sumitted,

Leonel Laurel

Affidavit

Leonel Laurel, deposes and says:

I am the defendant in this action.

I wish to appeal from the order of this court entered on the 13th of April, 1979, and this appeal notice was sent on the 25 th day of April, 1979, the order only having reached the defendant on the 23rd day of April, 1979.

I believe I am entitled to a reversal of the order mentioned on the following gounds: 1) That this order is not responsive in any way to the motion filed, 2) That common reason and plain English is xxx in favor of granting the requested relief. 3) That this Court did not meet the reasoned argument for relief set out in defendant's motion and memorandum brief, but denied same without reason citing no xxxxxxx revelant cases. That Dankert is an unreasoned Per Curiam opinion that surely will not hold.

I am unable to pay the court fees and and costs necessary to prosecute my appeal

and I am also unable to give security for their payment.

I am because of my poverty unable to pay or give security for costs and still provide myself and my dependents with the necessities of life.

I have no property, no money or any assets of any kind. I am incarcerated and have been for a number of years. I make less than $30.00 per month.

I therefore request leave to prosecute the proposed appeal in forma pauperis.

Leonel Laurel

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on the 29th day of April, 1975.

Pursuant to 28 U.S.C. 1746. Leonel Laurel

D-4

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

FILED

MAY 9 1979

CLERK, U.S. DISTRICT COURT

BY Mata DEPUTY

UNITED STATES OF AMERICA)
)
V.) CAUSE NO. SA-76-CR-8
)
LEONEL LAUREL)

ORDER

On this 9th day of May, 1979 came on to be considered the Motion to Proceed on Appeal in Forma Pauperis filed by Leonel Laurel in the above styled and numbered cause. After carefully considering the motion along with the entire file and record of the case, the Court is of the opinion that the motion should be denied. As stated in Rule 24 of the Federal Rules of Appellate Procedure, when the district court denies a Motion to Proceed on Appeal in Forma Pauperis it must certify that the appeal is not taken in good faith. The Court has determined that in this case an appeal would be frivolous and interposed merely for delay. Therefore, the Court hereby certifies that an appeal in this case would not be in good faith and denies the Motion to Proceed on Appeal in Forma Pauperis.

ORDERED and ENTERED this 9th day of May, 1979.

JOHN H. WOOD, JR.
UNITED STATES DISTRICT JUDGE

E-1

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA	*	
	*	
VS.	*	
	*	IN THE U. S. DISTRICT COURT
LEONEL LAUREL	*	WESTERN DISTRICT OF TEXAS
		CAUSE NO. SA 76 CR 8

MOTION TO PROCEED IN FORMA PAUPERIS PURSUANT TO RULE 24 FEDERAL RULES OF APPELLATE PROCEDURE

LEONEL LAUREL, PRO SE
BOX 1000 89216 132
LEAVENWORTH, KS 66048

F-1

MOTION

TO THE HONORABLE JUDGES OF SAID COUR:

Now comes Leonel Laurel, hereinafter called appellant, and moves this Court pursuant to Rule 24, 28 USC F.R.A.P., to permit him to go forward in forma pauperis, and would for cause show the court the followings

I.

That on April 21, 1976, defendant-appellant was sentenced to 15 years incarceration and 15 years special parole term after having plead guilty on February 25, 1976, in the Western District Court of Texas, San Antonio Division, before the Honorable Judge John H. Wood, Jr. under 18 USC § 846.

II.

On or about February 23, 1979, a motion to correct an illegal sentence pursuant to Rule 35, F.R.Cr.P. was mailed in and filed in this cause.

III.

On or about April 12, 1979, a motion was mailed to the District Clerk asking the Judge to rule on the Rule 35 motion to correct an illegal sentence.

IV.

On April 18, 1979, Judge Wood entered an Order denying relief treating the motion to correct an illegal sentence as a motion to reduce sentence. The reasons given for the denial are not responsive in any way to the original motion.

IV.

On or about April 25, 1979, appellant filed a "Notice of Appeal" from such denial mentioned above and a motion to proceed in forma pauperis and affidavit to support this motion.

F-2

V.

On May 9, 1979, Judge Wood entered an Order denying appellant permission to proceed in forma pauperis. The Court determined "that in this case an appeal would be frivolous and interposed merely for delay." And then proceeded to certify that an appeal would not be in "good faith". Again the reasons given for the denial are not responsive to the motion.

VI.

Appellant believes that the ORDER entered May 9, 1979, is a standard form used in San Antonio Division with the Judge's signature stamped thereon. That the only difference in this order and the many such order entered are the date, the appellant's name and the Cause No.

VII.

How the Court found and determined that this motion and appeal was "interposed merely for delay" is quite incomprehensible. What is supposed to be delayed?

VIII.

Attached hereto as required by the rule is the Notice of Appeal and Motion to proceed in forma pauperis with affidavit.

Wherefore, premises considered, this appellant prays that this Court grant him the right to proceed in forma pauperis in this appeal.

Respectfully Submitted,

Leonel Laurel, pro se
Box 1000 89216-132
Leavenworth, KS 66048

I certify that a copy of the above motion, less attachments which have been delivered heretofor, has been delivered to the U.S. Attorney, Western District of Texas, by placing same in the U.S. Mail at the Leavenworth Camp, Leavenworth KS 66048

Leonel Laurel, pro se.

F-3

Box 1000 89216 132
LEAVENWORTH, KS 66048
JUNE 23, 1979.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
600 CAMP ST.
NEW ORLEANS, LA 70130

DEAR JUDGES:

The following events have occured in my case:

April 21, 1976: Sentenced by Judge Wood to 15 years incarceration and 15 years SPT.

February 23, 1979: Mailed in a motion to correct and illegal sentence under Rule 35 FRCrP together with a brief.

April 12, 1979: Mailed in a motion requesting the Judge to act on the Rule 35 Motion heretofore filed.

April 13, 1979: An Order was entered stating that the court had no jurisdiction because of the 120 day time limit in Rule 35 FRCrP and that he would not reduce the sentence anyway. The order was totally unresponsive to the motion.

April 25, 1979: A "Notice of Appeal" from such order was mailed together with a motion to proceed in forma pauperis.

May 9th, 1979: An "Order" was entered by the court overruling defendant's motion to proceed in forma pauperis giving the reasons as "an appeal would be frivolous and interposed merely for delay." This Order was a memeograph type instrument with the defendant's named typed in and the date and cause numbered typed in and a rubber stamp signature of the Judge. The order is unresponsive. This appeal could not be frivolous and the term "delay" has no place in it.

G-1

May 18, 1979: Defendant received a letter from the Clerk of this court dated May 15, 1979, asking for a $50.00 filing fee and stating within forty days if not paid the appeal would be dismissed.

The same day a Motion to Proceed in Forma Pauperis was mailed to the Court of Appeals, Fifth Circuit. Copies were mailed to the USA and District Clerk, San Antonio.

As to this date no response from the Circuit Court has been had.

Would the Judges please rule on defendant's motion to proceed in forma pauperis and inform defendant so that he might move on to any other relief that he may find.

It should be noted here that on July 1, 1979, the Bureau of Prisons and the Department of Justice has taken from the prisoner the right to have legal mail franked. This will throw a heavy burden on all Forma Pauperis appellants and the Court might like to relief this pressure by entry of some kind of order, either permitting the forma pauperis appellant so much postage or ordering the Bureau of Prisons to frank such mail. Something should be done. And this Court although not having any jurisdiction on all legal mail certainly has jurisdiction to enter any order in furtherance of Justice in any particular case.

Respectfully Submitted,

Leonel Laurel, pro se.

cc: USA, San Antonio
District Clerk, San Antonio.

C-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JUL 6 '79
EDWARD W. WADSWORTH
CLERK

NO. 79-8293

LEONEL LAUREL,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

- - - - -

On Application for Leave to Appeal in Forma Pauperis

- - - - -

O R D E R:

IT IS ORDERED that the petitioner's pro se application for leave to appeal in forma pauperis is Denied

James C. Hill
UNITED STATES CIRCUIT JUDGE

H-1

No. 79-5184

Supreme Court, U. S.
FILED
SEP 21 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

LEONEL LAUREL, PETITIONER

v.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ON PETITION FOR A WRIT OF MANDAMUS TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D. C. 20530

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 79-5184

LEONEL LAUREL, PETITIONER

v.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ON PETITION FOR A WRIT OF MANDAMUS TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Petitioner contends that he was improperly sentenced to a special parole term for conspiring to possess heroin with intent to distribute in violation of 21 U.S.C. 846.

1. On April 24, 1976, pursuant to his plea of guilty, petitioner was convicted in the United States District Court for the Western District of Texas of conspiring to possess heroin, with intent to distribute, in violation of 21 U.S.C. 846. Petitioner was sentenced to fifteen years' imprisonment, to be followed by a fifteen year term of special parole. No direct appeal was taken from the conviction or the sentence.

On February 23, 1979, petitioner filed a motion under Fed.R.Crim.P. 35 to correct his sentence, claiming that imposition of a special parole term was not authorized for the drug conspiracy offense (Pet. App. B). On April 18, 1979, the motion was dismissed as untimely. The court also held that, in any event, reduction of the sentence was unwarranted (Pet. App. C). Thereafter, petitioner filed a notice of appeal, and a motion to proceed in forma pauperis. The district court determined that the appeal was frivolous and interposed merely for delay, and denied the motion to proceed in forma pauperis (Pet. App. D-1 to D-3, E-1). The court of appeals also denied leave to proceed in forma pauperis (Pet. App. H-1).

2. In this petition for a writ of mandamus, petitioner contends that imposition of a special parole term for his conspiracy conviction was not authorized by 21 U.S.C. 846, and, hence, the courts below erred in denying his application for leave to appeal in forma pauperis.

Petitioner's contention that 21 U.S.C. 846 does not authorize the imposition of a special parole term for a conspiracy conviction is the same claim presented by the petitioner in United States v. Bifulco, No. 79-5010, petition for certiorari filed July 31, 1979. We have acquiesced in the petition for certiorari in that case because there is a division among the circuits on that question. For the reasons we have stated at greater length in our response to the petition in Bifulco

(Br. 4-5), 1/ most of the circuits have correctly held that Section 846 does authorize a special parole term for conspiracy convictions. See United States v. Sellers, No. 79-1107 slip op. 11-14 (8th Cir. August 7, 1979); Cantu v. United States, 598 F.2d 471, 472 (5th Cir. 1979); United States v. Houde, 596 F.2d 696, 701 & n.1 (5th Cir. 1979); United States v. Burman, 584 F.2d 1354, 1358 (4th Cir. 1978); United States v. Jacobson, 578 F.2d 863, 867-868 (10th Cir. 1978), cert. denied, No. 78-5226 (October 30, 1978); see also United States v. Dankert, 507 F.2d 190, 191 (5th Cir. 1975). The Third Circuit, however, has held to the contrary in United States v. Mearns, 599 F.2d 1296 (3d Cir. 1979), cert. petition pending, No. 79-415. Because we believe that the conflict warrants this Court's review, this Court should treat the petition as a petition for a writ of certiorari (see Doherty v. United States,

1/ A copy of our response in Bifulco has been sent to petitioner.

404 U.S. 28 (1971)) 2/ and should hold the petition pending its disposition of the petition in Bifulco.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

SEPTEMBER 1979

2/ As a procedural matter, a writ of mandamus is not a proper remedy, because that remedy is available only in exceptional circumstances and is not a substitute for appeal or petition for a writ of certiorari. Since petitioner could seek this Court's review of the court of appeals' denial of his motion to proceed in forma pauperis by a petition for a writ of certiorari, the petition for mandamus should be treated as a petition for a writ of certiorari. See Doherty v. United States, supra.

Although the district court denied petitioner's Rule 35 motion on the merits (correctly, we believe), it also denied the motion as untimely, since it was filed more than 120 days after the imposition of the sentence. The latter ground was incorrect because Rule 35 states: "The Court may correct an illegal sentence at any time * * *" and petitioner's contention was that the special parole term was unlawful.